American Bar Association
www.supremecourtpreview.org

No. 07-1529

IN THE
Supreme Court of the United States

JESSIE JAY MONTEJO,
Petitioner,

v.
STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF LOUISIANA, AND THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW AS AMICI CURIAE IN SUPPORT OF PETITIONER

BARBARA BERGMAN
Co-chair, Amicus Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1117 Stanford, N.E.
Albuquerque, N.M. 87131
(505) 277-3304

JONATHAN L. MARCUS
Counsel of Record
ANNA E. LUMELSKY
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

NOVEMBER 2008

(*additional counsel listed on inside cover*)

DC: 3025073-6

STEVEN SHAPIRO
ROBIN DAHLBERG
AMERICAN CIVIL LIBERTIES UNION NATIONAL LEGAL OFFICE
125 Broad Street
18th Floor
New York, NY 10004
(212) 549-2500

DAVID S. UDELL
MELANCA CLARK
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
(212) 998-6730

KATIE SCHWARTZMANN
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF LOUISIANA
PO Box 56157
New Orleans, LA 70156
(504) 592-8056

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... iii

INTEREST OF AMICI CURIAE 1

STATEMENT 3

SUMMARY OF ARGUMENT.....8

ARGUMENT 13

I. The Louisiana Supreme Court's Decision To Exclude A Category Of Represented Defendants From The Protection That *Michigan v. Jackson* Provides Against Police-Initiated Interrogation Is Incorrect.....13

A. In Light Of Actual State And Local Practices, the Line Drawn By The Louisiana Supreme Court Between Petitioner And Other Represented Defendants Is Unfair.....14

B. The Louisiana Supreme Court's Approach Would Render The Bright-Line *Jackson* Rule Unworkable And Would Not Provide Adequate Guidance To The Police. 19

C. The Louisiana Supreme Court's Decision Is Illogical.....22

II. Once Adversarial Proceedings Have Commenced, The Sixth Amendment Prohibits Police-Initiated Interrogation Of All Represented Defendants In The Absence Of Counsel. 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Carnley v. Cochran, 369 U.S. 506 (1962).....16, 23, 24

Danforth v. Minnesota, 128 S. Ct. 1029 (2008) 2

Faretta v. California, 422 U.S. 806 (1975) 24

Gideon v. Wainwright, 372 U.S. 335 (1963) 2, 26

Giles v. California, 128 S. Ct. 2678 (2008) 1

Hamdan v. Rumsfeld, 548 U.S. 557 (2006) 2

Indiana v. Edwards, 128 S. Ct. 2379 (2008) 1

Kennedy v. Louisiana, 128 S. Ct. 2641 (2008).....2

Kimbrough v. United States,
128 S. Ct. 558 (2007).....2

Maine v. Moulton,
474 U.S. 159 (1985).....12, 25, 26, 27, 28

Massiah v. United States,
377 U.S. 201 (1964).....27

McNeil v. Wisconsin, 501 U.S. 171 (1991).....23, 25

Michigan v. Harvey,
494 U.S. 344 (1990).....8, 12, 13, 25, 28

Michigan v. Jackson, 475 U.S. 625 (1986) .....*passim*

Miranda v. Arizona, 384 U.S. 436 (1966).....8, 23

Montoya v. Collins, 955 F.2d 279 (5th Cir. 1992) 20

Moran v. Burbine, 475 U.S. 412 (1986) 8, 26

Patterson v. Illinois,
487 U.S. 285 (1988).....8, 12, 13, 25, 28

Rothgery v. Gillespie County,
128 S. Ct. 2578 (2008) 1, 2, 12, 22, 26

Schriro v. Landrigan, 550 U.S. 465 (2007) 1

State v. Carter, 664 So. 2d 367 (La. 1995) 7

United States v. Gouveia, 467 U.S. 180 (1984) 26

United States v. Henry, 447 U.S. 264 (1980) 27

Virginia v. Moore, 128 S. Ct. 1598 (2008) 2

STATUTES AND RULES

Ark. R. Crim. Proc. 8.2 (2008) 24

Cal. Penal Code § 859 (2008) 14

Fla. R. Crim. Proc. 3.111 (2008) 16

Idaho Crim. Rule 44 (2008) 24

Idaho Code Ann. § 19-853 (2008) 15

La. Code Crim. Proc. Ann. art. 230.1 (2008) 4

Mont. Code Ann. § 46-8-101 (2007) 15

Utah Code Ann. § 77-32-302 (2008) 15

OTHER AUTHORITIES

Brennan Center for Justice, The Access to Justice Program, *Eligible for Justice: Guidelines for Appointing Defense Counsel* (2008) 18

INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a membership of more than 12,000 and affiliate memberships of almost 40,000. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates. The NACDL files numerous amicus briefs before this Court each year. Recent cases in which the NACDL has filed an amicus brief include *Giles v. California*, 128 S. Ct. 2678 (2008); *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008); *Indiana v. Edwards*, 128 S. Ct. 2379 (2008); and *Schriro v. Landrigan*, 550 U.S. 465 (2007).

The American Civil Liberties Union ("ACLU") is a nonprofit, nonpartisan national organization with over 500,000 members, and the ACLU of Louisiana is one of its state affiliates. The ACLU was founded in 1920, and is dedicated to preserving the principles of

---

[1] Each party has consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

liberty and equality embodied in the Constitution and the civil rights laws of this country. The ACLU files numerous amicus briefs before this Court each year. Recent cases in which the ACLU has filed an amicus brief include *Kennedy v. Louisiana,* 128 S. Ct. 2641 (2008); *Virginia v. Moore,* 128 S. Ct. 1598 (2008); *Danforth v. Minnesota,* 128 S. Ct. 1029 (2008); and *Kimbrough v. United States*, 128 S. Ct. 558 (2007).

The Brennan Center for Justice at New York University School of Law ("Brennan Center") is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. An important part of the Brennan Center's work is its effort to close the "justice gap" by strengthening public defender services and working to secure the promise of *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Brennan Center's Access to Justice Project works to ensure that low-income individuals, families, and communities in this country are able to obtain effective legal representation. The Brennan Center has filed a number of amicus briefs in cases before this Court, including *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008) and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

The members of the NACDL, ACLU, the ACLU of Louisiana, and the Brennan Center are acutely aware of the challenges faced by indigent defendants in the criminal justice system, and have a strong interest in ensuring that such defendants receive the full protections of the Constitution. Each organization believes that this case presents important issues related to the Sixth Amendment

right of indigent defendants to be free from police-initiated interrogation without counsel present after counsel has been appointed.

STATEMENT

1. On September 6, 2002, Petitioner Jessie Jay Montejo was taken to the Gretna, Louisiana police station for questioning in connection with a murder investigation. Pet. App. 9a-10a. At the Gretna police station, Petitioner asked for an attorney but was told by the Gretna detectives that they "wouldn't really recommend that." R2779 (Trial Tr. 3/8/2005); Pet. App. 10a n.19. Petitioner was then transferred to a St. Tammany Parish Sheriff's office, where he was questioned from about 4:30 p.m. to 11 p.m. on September 6. *Id.* at 9a. Petitioner was jailed for several hours after this interrogation, and was then transported to a different St. Tammany Parish Sheriff's office, where he was interrogated for an additional hour very early on the morning of September 7. *Id.*; R. 2350 (Trial Tr. 3/6/2005); R. 2706-07, 2730 (Trial Tr. 3/8/2005).

On videotape, Petitioner initially discussed the case with the police, Pet. App. 11a-14a, but then stated that he would "answer no more questions unless" he had a lawyer, *id.* at 14a. The police immediately told Petitioner that he was under arrest for first degree murder, and then began scolding him for asking for a lawyer, which caused him to relent:

> Detective Major: (interrupting) Dude, you don't want to talk to us no more, you want a lawyer, right? I trusted you and you let me down.
> Petitioner: No, come here, come here.
> Detective Major: No, no, I can't.
> Petitioner: No, come here . . .
> Detective Major: No, you've asked for an attorney, and you are getting your charge. And the shame of it is . . .
> Petitioner: I don't want no attorney.

Id. at 15a. The video recorder was turned off at this point. *Id.* When it was turned on ten minutes later, the detectives stated on camera that Petitioner was not interviewed during the untaped interval, that he understood his rights, and that he wanted to continue the interview without counsel present. *Id.* at 15a-16a. Petitioner, however, looked "visibly upset." *Id.* at 16a. Questioning resumed and lasted until about 11 p.m., when Petitioner was jailed. He was then questioned for an additional hour in the early morning of September 7. *Id.* at 9a, 16a-17a.

On September 10, 2002, Petitioner was brought before a judge for a "72-hour hearing," as required by Louisiana law. Pet. App. 42a; La. Code Crim. Proc. Ann. art. 230.1 (2008).[2] No transcript was made. The only record of the hearing states that the

---

[2] Article 230.1 of the Louisiana Code of Criminal Procedure provides, in relevant part, that "[t]he sheriff or law enforcement officer having custody of an arrested person shall bring him promptly, and in any case within seventy-two hours from the time of the arrest, before a judge for the purpose of appointment of counsel." La. Code Crim. Proc. Ann. art. 230.1 (A) (2008).

District Attorney, Sheriff, and Clerk of Court attended, and describes the proceedings as follows:

> The defendant being present and this matter came before the Court for Seventy-Two Hour Hearing to determine bond and Counsel. The defendant being charged with First Degree Murder, Court ordered No Bond set in this matter. Further, Court ordered the Office of the Indigent Defender be appointed to represent the defendant.

Pet. App. 63a. Later that same day, police approached Petitioner without his counsel present and asked him to accompany them on a search for the murder weapon. R2582-83 (Trial Tr. 3/7/2005). Petitioner responded that counsel had been appointed to him, as he testified at trial:

> They asked me if I would come with them to go clear up where I threw the gun at. So I said, Well, and I don't, I don't, I don't really want to go with you. He said, Do you have a lawyer? I said, yeah, I got a lawyer appointed to me. He said, No, no, you don't. I said, Yeah, I think I got a lawyer appointed to me, and I guess that's where I messed up, when I said I think I got a lawyer appointed to me. He said, no, you don't. He said, I checked, you don't have a lawyer appointed to you.

Pet. App. 49a.[3] Following this exchange, Petitioner agreed to accompany the detectives. During the car ride, Petitioner used pen and paper provided by the detectives to write a letter of apology to the victim's wife. *Id*. at 20a. Petitioner testified that the idea of the letter was suggested by one of the detectives and that its contents were largely dictated by the other detective. R2790-91 (Trial Tr. 3/8/2005). The detectives were unable to locate the murder weapon, and they eventually returned Petitioner to the St. Tammany jail, where Detective Hall was confronted by Petitioner's appointed counsel. Pet. App. 21a n.46.

Petitioner was indicted on October 24, 2002. Pet. App. 1a. Following a suppression hearing, the trial court held that the September 10 letter was admissible at trial. *Id*. at 21a-22a. A jury found Petitioner guilty of first-degree murder, and he was sentenced to death on May 13, 2005. *Id*. at 69a.

2. The Louisiana Supreme Court affirmed. Pet. App. 42a-51a. As relevant here, it rejected Petitioner's contention that the trial court erred in admitting the letter because he had not validly waived his Sixth Amendment right to counsel before writing the letter. *Id*.

The court noted that, under *Michigan v. Jackson*, 475 U.S. 625 (1986), "once defendant's right to

---

[3] Detective Jerry Hall, who approached Petitioner about the car ride, testified that he did not know that Petitioner had been appointed counsel at the time, despite the fact that a representative of the Sheriff's Office had attended the 72-hour hearing that morning. Pet. App. 50a, 63a.

counsel has attached, if he makes an assertion or invocation of this right, any waiver he would later make in response to police-initiated interrogation will be considered invalid." Pet. App. 46a (quoting *State v. Carter*, 664 So. 2d 367, 382 (La. 1995)). The court concluded that the *Jackson* rule did not apply here despite the fact that Petitioner was represented by counsel at the time Detective Hall approached him. *Id.* at 46a-48a. The court pointed to the "minute entry" for the 72-hour hearing, which showed that, "[w]hile . . . counsel was appointed, it does not show a response by defendant." *Id.* at 47a. The court stated that, under its precedent, "something more than the mere mute acquiescence in the appointment of counsel is necessary to show the defendant has asserted his right to counsel to sufficiently trigger" the *Jackson* rule. *Id.* (internal quotation marks and brackets omitted). Because Petitioner did "not allege that he made any statement at th[e] hearing asserting his right to counsel," the court held that Petitioner's Sixth Amendment right to counsel was not protected by the *Jackson* rule. *Id.*

The Louisiana Supreme Court next rejected Petitioner's contention that he did not knowingly waive his Sixth Amendment right to counsel. Pet. App. 49a-51a. Assuming that the police misled Petitioner in response to his assertion that he was represented by counsel by telling him incorrectly that he did not have a lawyer, *id.* at 49a & n.69, the court held nonetheless that Petitioner's waiver was knowing and intelligent because the police gave him

the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966); Pet. App. 51a.[4]

SUMMARY OF ARGUMENT

In *Michigan v. Jackson*, 475 U.S. 625 (1986), this Court held that, when a defendant requests counsel at an arraignment or similar proceeding, a later waiver of that right during police-initiated interrogation is invalid under the Sixth Amendment. In subsequent cases, this Court made clear that the *Jackson* rule applies "once a defendant obtains or even requests counsel." *Michigan v. Harvey*, 494 U.S. 344, 352 (1990). *See Patterson v. Illinois*, 487 U.S. 285, 290 n.3 (1988) (observing that, while an unrepresented defendant may be interrogated by police without counsel present after adversarial proceedings have begun, "[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect").

---

[4] In so holding, the court stated that the facts here did "not rise to the level of the facts presented in *Moran v. Burbine*, [475 U.S. 412 (1986)]" in which "the United States Supreme Court permitted a *Miranda* waiver to stand under the Sixth Amendment where a suspect was not told that his lawyer was trying to reach him during questioning and the lawyer was told by police that the defendant would not be questioned without the lawyer's presence." Pet. App. 49a-50a n.69. The court's description of this Court's holding in *Burbine* is erroneous: *Burbine* held that the Sixth Amendment was inapplicable to the interrogation, which "preceded the formal initiation of adversary judicial proceedings." 475 U.S. at 432. The conduct of the police thus only factored into the Court's analysis of the scope of *Miranda* in protecting the defendant's Fifth Amendment rights.

The Louisiana Supreme Court carved out an exception to the *Jackson* rule, permitting the police to initiate interrogation of a represented defendant without counsel present if the defendant accepted the appointment of counsel silently—that is, without having made a statement or gesture affirming the acceptance. The Louisiana Supreme Court's approach is unfair, unworkable, and illogical. It will also undermine the Sixth Amendment right to counsel at a critical stage of the prosecution. For all of these reasons, the decision should be reversed.

The Louisiana Supreme Court's approach is unfair because different jurisdictions follow different policies and practices in the appointment of counsel, and these policies and practices often determine whether or not a defendant makes an explicit request for counsel on the record. Many states require courts to ask the defendant whether he wants counsel to be appointed for him. Requests for counsel in these states thus are typically prompted by the State and reflect nothing more than compliance with state procedure geared towards determining whether a defendant is indigent and thus needs appointed counsel. Other states do not require courts to question the defendant before appointing counsel. The absence of a request in these states thus reflects nothing more than the absence of a built-in opportunity at the initial hearing for the defendant to provide input. Given the differences in procedure from state to state, jurisdiction to jurisdiction, and courtroom to courtroom, and given that the procedures are designed to facilitate the appointment of counsel to indigent defendants rather than to measure a

defendant's desire to proceed *pro se,* it is unfair to use the presence or absence of a request for counsel during the initial hearing as a proxy for a represented defendant's desire to have counsel protect him from police-initiated interrogation. Rather, the fact that the defendant has obtained counsel in itself reflects that desire.

The Louisiana Supreme Court discounted the fact of representation here because Petitioner accepted the court's appointment of counsel silently. But requiring the defendant to make a statement or gesture affirming the acceptance is unfair. There is no indication that Petitioner was given an opportunity to speak in response to the appointment, and there is no reason why Petitioner would have felt any need to assert or reaffirm his right to counsel after the court affirmed that right by appointing him one.

The Louisiana Supreme Court's approach is also unworkable. Conditioning the application of *Jackson* on the nature of the defendant's response to the appointment of counsel invites disputes about what the defendant said or did at his initial hearing. The problem is that the best evidence to resolve such a dispute—a transcript or videotape of the hearing—will often be unavailable, as it was here. The Louisiana Supreme Court's approach will also create difficult line-drawing problems, detracting from the bright-line quality of the *Jackson* rule, because it is unclear what statements or gestures will be deemed sufficient to constitute an affirmation of the acceptance of counsel.

The decision also does not provide clear guidance to the police. First, although the police

may often attend initial hearings, in the cases in which they do not, they will not know whether they may initiate interrogation of a represented defendant without counsel present. Second, even in those cases in which the police have attended the hearing, they will have to decide whether a statement or gesture by the defendant sufficiently affirmed his acceptance of counsel before initiating interrogation. The ambiguity inherent in the Louisiana Supreme Court's approach will make that determination difficult.

The Louisiana Supreme Court's approach to *Jackson* not only is unfair and unworkable, but it also is illogical. The Court in *Jackson* held that a defendant who fills out an affidavit for the appointment of counsel presumptively desires representation at every critical stage of the prosecution, including for police-initiated interrogation. There is no logical basis for applying a different presumption to a defendant who is represented by counsel. The Louisiana Supreme Court did not hold that Petitioner waived his right to counsel by remaining silent at the 72-hour hearing, nor could it have so held given the many steps a court and defendant must take to waive the right. Instead, the court held that it could not presume Petitioner's desire for counsel at police-initiated interrogation from his mere "acquiescence" (Pet. App. 47a) in counsel's appointment. In principle, such reasoning could be applied to other critical stages of the prosecution, such as a preliminary hearing or trial, but a presumption against a represented defendant's desire for counsel at these stages is clearly untenable. Yet there is no sound basis for

presuming that Petitioner desired counsel for some purposes but not others. To the contrary, a represented defendant, no less than the defendant in *Jackson* who followed the requisite steps to obtain representation, is presumed to desire counsel for all critical stages of the prosecution. This Court confirmed this common sense proposition in *Harvey* and *Patterson,* where it made clear that police cannot initiate interrogation of represented defendants without counsel present. For all of these reasons, the Louisiana Supreme Court's decision to carve out a subset of represented defendants from *Jackson*'s protection should be reversed.

The Louisiana Supreme Court's decision undermines the Sixth Amendment's guarantee of counsel as a "'medium' between [the defendant] and the State." *Maine v. Moulton*, 474 U.S. 159, 176 (1985). As this Court has repeatedly recognized, the defendant "is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings." *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2591 (2008). Pretrial interrogation is a critical stage. *See id.* at 2594 (Alito, J., concurring) (citing cases). By permitting the police to elicit incriminating statements from indigent defendants in the absence of their counsel, the Louisiana Supreme Court has diluted the protection that the Sixth Amendment right to counsel is designed to afford represented defendants.

The egregious facts of this case starkly demonstrate that point. The police approached Petitioner before his counsel could reach him and induced him to make incriminating statements by falsely informing him—in response to his assertion

that he was represented by counsel—that he did not have an attorney. Requiring that a defendant's attorney be present for police-initiated interrogation ensures that the police are unable to eviscerate the Sixth Amendment right to counsel as they did here.

ARGUMENT

I. The Louisiana Supreme Court's Decision To Exclude A Category Of Represented Defendants From The Protection That *Michigan v. Jackson* Provides Against Police-Initiated Interrogation Is Incorrect.

In *Michigan v. Jackson*, 475 U.S. 625 (1986), this Court held that a defendant's waiver of the right to counsel during police-initiated interrogation was invalid where the defendant had previously requested counsel at an arraignment or similar proceeding. *Id.* at 636. In *Michigan v. Harvey*, 494 U.S. 344 (1990), and *Patterson v. Illinois*, 487 U.S. 285 (1988), this Court made clear that the *Jackson* rule applies to any defendant who *has* counsel as well as to a defendant who requests counsel. *See Harvey,* 494 U.S. at 352; *Patterson*, 487 U.S. at 290 n.3. In doing so, the Court recognized that a defendant who is already represented by counsel must be entitled to no less protection against police-initiated interrogation than a defendant who has merely asked the court for counsel. As explained below, the Louisiana Supreme Court's decision to exclude from *Jackson*'s ambit a defendant who silently accepts appointed counsel is unfair,

unworkable, and illogical. For all of these reasons, the decision should be reversed.

A. In Light Of Actual State And Local Practices, the Line Drawn By The Louisiana Supreme Court Between Petitioner And Other Represented Defendants Is Unfair.

Policies and practices governing the provision of counsel to indigent defendants vary greatly both by state and within states. Certain jurisdictions require a judge to ask defendants whether they request counsel before appointing counsel, while others do not. Beyond the written rules, moreover, judges often have significant freedom to devise their own procedures for appointment of counsel, and practices can differ even between two judges in the same courthouse. In light of the lack of uniformity, a defendant's request for the appointment of counsel at a hearing or the absence of such a request is often indicative of nothing more than the particular rules and practices of the court in which the defendant appeared.

Some jurisdictions provide an affirmative opportunity for the defendant to express a desire for the appointment of counsel. In California, for example, the Penal Code provides that when a defendant is charged with a felony, the magistrate shall "*ask the defendant* if he or she desires the assistance of counsel . . . If the defendant desires and is unable to employ counsel, the court shall assign counsel to defend him or her." Cal. Penal Code § 859 (2008) (emphasis added). Similarly, Montana requires that "[d]uring the initial appearance before the court, every defendant must be informed of the

right to have counsel and *must be asked* if the aid of counsel is desired." Mont. Code Ann. § 46-8-101 (2007) (emphasis added). In these states, most defendants presumably make a request for counsel on the record, simply because they are prompted by the court.

By contrast, many jurisdictions appoint counsel without asking the defendant any questions. In Utah, for example, the relevant statute provides that a judge should appoint counsel either if "the indigent requests counsel" *or* if "the court on its own motion or otherwise orders counsel, . . . and the defendant does not affirmatively waive or reject on the record the opportunity to be represented." Utah Code Ann. § 77-32-302 (2008). Similarly, the relevant Idaho provision makes no reference to a request by the accused: "If a court determines that the person is entitled to be represented by an attorney at public expense, it shall promptly notify the public defender or assign an attorney, as the case may be." Idaho Code Ann. § 19-853(c) (2008). Without a procedural opportunity to speak in jurisdictions like these, it would be surprising for the defendant to make spontaneous comments regarding counsel. Because a difference in state or local procedures rather than a difference in the relative desire for counsel will typically explain the presence or absence of a request for counsel at an initial hearing, the Louisiana Supreme Court's approach—which uses the request as a proxy for the desire to have counsel— is unjust.[5]

---

[5] The fact that some jurisdictions call for the court to ask whether the defendant requests counsel does not mean that (...continued)

The facts in *Michigan v. Jackson* demonstrate how local practice can determine whether the defendant requests counsel at a hearing. In *Jackson*, this Court determined that "[d]uring the arraignment, [the defendant] requested that counsel be appointed for him." 475 U.S. at 628. The transcript of that arraignment, in pertinent part, reads as follows:

> THE COURT: The Court will enter a plea of not guilty. In the case of the people versus Robert Bernard Jackson, and Michael White, and Charles Knight, you have each filled out an affidavit for appointment of counsel. Will each of you raise your right hand. Do you swear or affirm that the statements made in these affidavits for appointment of counsel are all true?
>
> (Defendants responded.)

---

these jurisdictions will treat the absence of a request for counsel as a waiver. For example, under Florida law, a defendant is given the opportunity to request counsel, but the absence of a request standing alone will not prevent the appointment of counsel. *See* Fla. R. Crim. Proc. 3.111(b)(5) (2008) ("Before appointing a public defender the court shall . . . (B) make inquiry into the financial status of the accused . . . . The accused shall respond to the inquiry under oath.) ; *Id.* § 3.111(d)(1) ("The failure of a defendant to request appointment of counsel . . . shall not, in itself, constitute a waiver of counsel at any stage of the proceedings."). Indeed, the Constitution prohibits states from conditioning the appointment of counsel on a request. *See Carnley v. Cochran*, 369 U.S. 506, 513 (1962) ("[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.").

> THE COURT: You each indicate yes. The Court will recommend appointment of counsel in each case.

Michigan v. Jackson, Supreme Court Joint App. 133-34. Thus, the defendant's request to the court in *Jackson* was merely an affirmation that statements in an affidavit (presumably attesting to indigency) were accurate.

The defendant in *Jackson* was simply following state procedures and the court's instructions in seeking to obtain counsel. Because Petitioner did all that was necessary in his jurisdiction to obtain counsel, there is no valid basis for distinguishing him from the defendant in *Jackson* for the purpose of determining the scope of Sixth Amendment protection. Indeed, the Louisiana Supreme Court's approach penalizes Petitioner for the mere happenstance of being prosecuted in a jurisdiction that permits the court to appoint counsel without input from the defendant based on a preliminary determination of indigency.[6]

---

[6] To the extent that the *Jackson* defendant's submission of an affidavit for appointment of counsel in itself constituted the relevant request for counsel, the distinction that the Louisiana Supreme Court tried to make would be subject to the same flaws. Because appointment of counsel generally requires a determination of indigency, many states and localities require the defendant to submit some type of financial affidavit for the provision of appointed counsel. Some jurisdictions follow this submission with an inquiry on the record, as in *Jackson*, while others do not. Both the indigency forms themselves and the procedures governing them differ by jurisdiction. *See, e.g.*, Ohio Financial Disclosure/Affidavit of Indigency Form and instructions, <http://www.lcmunicipalcourt.com/UserUploads/U
(...continued)

What these differences in state and local procedure highlight is that the process of appointing counsel for indigent defendants is geared not to gauging whether a defendant wants representation or to proceed *pro se*, but rather whether a defendant cannot afford to retain an attorney. Thus, how an indigent defendant complies with this process in obtaining appointed counsel is not a meaningful indicator of whether the defendant desires the assistance of counsel at police-initiated interrogation. To the contrary, the fact that the defendant has obtained counsel in itself reflects that desire.

The Louisiana Supreme Court discounted the fact that petitioner had been appointed counsel because he did not "respon[d]" to the appointment with a statement or gesture. Pet. App. 47a. But it was

---

serDocuments/FinancialDisclosureForm_AffidavitofIndigency.pdf>; Shelby County, Tennessee Criminal Court Uniform Affidavit of Indigency, <http://co4.shelbycountytn.gov/court_clerks/criminal_court/FORMS/UnifAffidavitIndig%20CC7-87(a-b).pdf>; State of Wisconsin Petition for Appointment of Counsel, Affidavit of Indigency and Order, <http://www.wicourts.gov/formdisplay/GF-152.pdf?formNumber=GF-152&formType=Form&formatId=2&language=en>.
Moreover, some judges conduct an oral screening for indigency; a defendant's responses to such screening questions arguably may suggest an assertion of the right to counsel, but procedural variation among jurisdictions would make a rule that turns on the assertion of the right to counsel impossible to apply. *See* Brennan Center for Justice, The Access to Justice Program, *Eligible for Justice: Guidelines for Appointing Defense Counsel* (2008), <http://www.brennancenter.org/content/resource/eligible_for_justice/>, at 7-8 (reporting that certain states have uniform indigency screening criteria and procedures while others do not, and that some counties do not screen for indigency at all).

unfair for the court to measure Petitioner's desire for counsel by whether he accepted the appointment silently or in animated fashion. The record does not reflect whether Petitioner was given an opportunity to speak upon being appointed counsel. Moreover, even if there had been such an opportunity, a reasonable person in Petitioner's shoes would not have had any reason to "assert his right to counsel" (*id*.) upon hearing the court appoint him counsel and thereby affirm his right to counsel. The line the court drew between Petitioner and other represented defendants for purposes of receiving the protection of counsel at police-initiated interrogation therefore is unfair.

B. The Louisiana Supreme Court's Approach Would Render The Bright-Line *Jackson* Rule Unworkable And Would Not Provide Adequate Guidance To The Police.

The Louisiana Supreme Court's decision also is unworkable. Instead of applying *Jackson* to all represented defendants, the Louisiana Supreme Court requires courts to determine whether a represented defendant made a request for counsel prior to appointment or "respond[ed]" to such an appointment in some manner. Pet. App. 47a. That inquiry will invite factual disputes that will be difficult to resolve because the best evidence of what the defendant said or did—–a transcript or videotape––is unlikely to be available. Where, as in this case, the relevant hearing was not transcribed, the court would have to rely on the possibly conflicting memories of hearing attendees to resolve the dispute.

Such an uncertain inquiry would also require difficult line-drawing. The Louisiana Supreme Court faulted Petitioner for making no "response" to the appointment of counsel, but it did not indicate what response would have sufficed to trigger *Jackson*'s protection. The Fifth Circuit's decision in *Montoya v. Collins*, 955 F.2d 279 (5th Cir. 1992), on which the Louisiana Supreme Court relied (*see* Pet. App. 47a n.68), similarly held that *Jackson* did not protect a defendant who was "silen[t]" when the court appointed counsel, but the court did not specify what statement or gesture would have been sufficient. *See Montoya*, 955 F.2d at 282-83 (while a defendant who has been appointed counsel need not state "I want a lawyer" to trigger *Jackson*'s protection, he must make "an actual, positive statement or affirmation of the right to counsel"). Perhaps the statement "Thank you, your honor" or "I appreciate it" would have been sufficient; perhaps not. In any event, it is untenable to have a represented defendant's right to avoid police-initiated interrogation without counsel present turn on whether the defendant merely "acquiesce[d]" (Pet. App. 47a) in the appointment of counsel or accepted counsel's services in a vocal or animated manner.

The Louisiana Supreme Court's decision also fails to provide adequate guidance to the police. If the police do not attend the initial hearing at which counsel is appointed, they will not know whether the defendant "respon[ded]" (Pet. App. 47a) to the appointment of counsel. And even when they do attend the hearing, they still must determine whether the defendant's statements or gestures were sufficient to satisfy the Louisiana Supreme Court's

ambiguous standard. In either scenario, the police will not have the guidance necessary to conduct their investigation in a constitutional manner.

Applying *Jackson* to all represented defendants would avoid the problems inherent in the Louisiana Supreme Court's approach and preserve *Jackson*'s bright-line nature. *See Jackson*, 475 U.S. at 634. Such a rule requires no line-drawing: After adversarial proceedings have commenced, police officers may not initiate questioning of a represented defendant outside the presence of counsel.

The Louisiana Supreme Court's approach sacrifices *Jackson*'s bright-line quality for an empty formalism, as this case illustrates so poignantly. Petitioner invoked his right to counsel during every significant encounter with the police, only to be deterred by the police from actually exercising it. He asked for counsel at the Gretna Police station, but was told by the police that "they would not recommend that." Pet. App. 10a n.19. He asserted the right to counsel again during his prolonged interrogation at the St. Tammany Sheriff's Office, prompting the police to announce that he was under arrest for first degree murder and had let them down. *Id*. at 14a-15a. And he invoked counsel once again—this time after his Sixth Amendment rights had attached and counsel had been appointed—when the police came to request that he show them where he disposed of the evidence, and was falsely told in response that he did not have a lawyer. *Id*. at

49a.[7] Yet, the Louisiana Supreme Court held that Petitioner did not "assert his right to counsel" for purposes of *Jackson* because he remained silent when the court appointed him counsel. Pet. App. 47a. The court thus penalized Petitioner for not asserting his right to counsel during the one proceeding where no such assertion was necessary to protect him from any adverse consequences of which he could reasonably have been aware.

Last term, this Court rejected a rule that Sixth Amendment protections do not attach at an initial appearance following a charge unless prosecutors are involved. *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008). The Court rejected such a rule in part because the rule in practice "would be wholly unworkable and impossible to administer" and rest on "absurd distinctions," *id.* at 2588. The Louisiana Supreme Court's approach to *Jackson* suffers from the same flaws. The decision should accordingly be reversed.

C. The Louisiana Supreme Court's Decision Is Illogical.

In *Jackson*, the State argued that a defendant's request for counsel at a court hearing did not constitute the expression of a desire for counsel

---

[7] Although detective Hall testified that he was unaware Petitioner had been appointed counsel, the law deems him to have had knowledge of that fact. As this Court explained in *Jackson*, "Sixth Amendment principles require that we impute the State's knowledge from one state actor to another." 475 U.S. at 634.

to be present at a police-initiated interrogation. *Id.* at 632-33. This Court's response to that argument, as it explained in *McNeil v. Wisconsin*, 501 U.S. 171 (1991),

> was not that [the defendant's request for counsel] *did* constitute such an expression [of a wish for counsel at a custodial interrogation], but that it *did not have to*, since the relevant question was not whether the *Miranda* 'Fifth Amendment' right had been *asserted*, but whether the Sixth Amendment right to counsel had been *waived*. We said that since our 'settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel, . . . we *presume* that the defendant requests the lawyer's services at every critical stage of the prosecution.' [*Jackson,*] 475 U.S. at 633 (emphasis added).

Id. at 179. The *Jackson* Court thus held that, where a defendant has requested counsel at a hearing (by affirming the truth of statements contained in an affidavit seeking appointment of counsel), that defendant is presumed to desire counsel's assistance at every critical stage of the prosecution, including police-initiated interrogation.

Contrary to the Louisiana Supreme Court's decision, there is no sound basis for not applying the same presumption to a defendant such as Petitioner who has been appointed counsel. The court did not hold that Petitioner had waived the right to counsel by remaining silent at the 72-hour hearing, nor could it have so held. *See Carnley v. Cochran*, 369 U.S.

506, 516 (1962) ("Presuming waiver [of the right to counsel] from a silent record is impermissible."); *Faretta v. California,* 422 U.S. 806, 835 (1975) (A court may accept waiver of the right to counsel only where the defendant is "made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.") (internal quotation marks omitted).[8] Instead, the court held that it could not presume that Petitioner desired counsel at police-initiated interrogation because he accepted the appointment of counsel silently. Identical reasoning could be applied to other critical stages of the prosecution, such as a preliminary hearing or trial, but a presumption against a represented defendant's desire for counsel at these stages is clearly untenable. Yet there is no logical basis for presuming from Petitioner's silence that he desired counsel's assistance for some critical purposes and not others.[9]

---

[8] Consistent with this principle, a number of states presume that defendants desire counsel unless they explicitly state that they do not. *See, e.g.*, Ark. R. Crim. Proc. 8.2(b) (2008) ("Whenever an indigent is charged with a criminal offense and, upon being brought before any court, does not knowingly and intelligently waive the appointment of counsel, the court shall appoint counsel to represent the indigent."); Idaho Crim. Rule 44 (2008) ("Every defendant, who according to law is entitled to appointed counsel, shall have counsel assigned to represent the defendant . . . unless the defendant waives such appointment.").

[9] As we explained above, p. 19, the most plausible inferences to be drawn from Petitioner's silent acceptance of counsel are that either (1) he did not have an opportunity to speak, or (2) he found it unnecessary to assert a right to counsel in the immediate wake of the court's appointment of counsel.

To the contrary, it is logical to presume that all represented defendants, no less than the defendant in *Jackson* who followed the procedures required to obtain appointed counsel, desire counsel's help for all critical stages of the prosecution. This Court has recognized the force of that logic, stating that *Jackson* applies to prevent police-initiated interrogation "once a defendant obtains or even requests counsel." *Harvey*, 494 U.S. at 352. *See also Patterson*, 487 U.S. at 290 n.3 (whereas the police may not initiate interrogation of a defendant who has "not retained, or accepted by appointment, a lawyer to represent him," "[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect"). The Louisiana Supreme Court's decision excluding a category of indigent, represented defendants from *Jackson*'s reach should be reversed.

II. Once Adversarial Proceedings Have Commenced, The Sixth Amendment Prohibits Police-Initiated Interrogation Of All Represented Defendants In The Absence Of Counsel.

This Court has recognized that "[t]he Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." *Maine v. Moulton*, 474 U.S. 159, 176 (1985). *See McNeil*, 501 U.S. at 177 ("The purpose of the Sixth Amendment counsel guarantee . . . is to 'protect the unaided layman at critical confrontations' with his 'expert adversary,' the government.") (quoting *United*

States v. Gouveia, 467 U.S. 180, 189 (1984)); *Moran v. Burbine*, 475 U.S. 412, 428 (1986) ("[W]e readily agree that once the [Sixth Amendment] right has attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a 'medium between [the suspect] and the State' during . . . interrogation.") (citation omitted); *Gideon v. Wainwright,* 372 U.S. 335, 344 (1963) (under the Sixth Amendment, a person charged with a crime need not "face his accusers without a lawyer to assist him").

This guarantee is based on a recognition that, once the adversarial process has commenced, the right to counsel "safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding." *Moulton*, 474 U.S. at 169; *see id.* at 170. Given the complexity of pretrial proceedings and their importance to the defendant's fate, "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." *Id.* at 170. As Justice Alito recently observed, "certain pretrial events may so prejudice the outcome of the defendant's prosecution that, as a practical matter, the defendant must be represented at those events in order to enjoy genuinely effective assistance at trial." *Rothgery*, 128 S. Ct. at 2594 (Alito, J., concurring). These events are known as "critical stages" of the prosecution, and it is well settled that "pretrial interrogation" is a critical stage. *See id.* at 2594; *Jackson*, 475 U.S. at 638. As explained below, the Louisiana Supreme Court's decision "dilutes the protection afforded by the right to counsel" (*Moulton*, 474 U.S. at 171) by permitting the police to initiate interrogation of indigent

defendants represented by counsel without counsel present, after adversary proceedings have commenced.

In a series of cases involving the deliberate elicitation of incriminating statements from represented defendants who were unaware they were speaking to the government, this Court held that the government's conduct violated the defendants' Sixth Amendment right to counsel. *See Moulton*, 474 U.S. at 176 (The Sixth Amendment right to counsel is violated "when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and the state agent."); *United States v. Henry,* 447 U.S. 264, 274 (1980) ("By intentionally creating a situation likely to induce [the defendant] to make incriminating statements without the assistance of counsel, the Government violated [his] Sixth Amendment right to counsel."); *Massiah v. United States*, 377 U.S. 201, 206 (1964) (The use at trial of statements "deliberately elicited from [the defendant] after he had been indicted and in the absence of counsel" violated the Sixth Amendment.). The principle announced in this line of cases—that the police may not circumvent a represented defendant's Sixth Amendment right to counsel by deliberately eliciting statements from the defendant without counsel present—is rooted in the relationship between a represented defendant and his or her attorney following the initiation of adversary proceedings and the recognition of the critical role the attorney plays in protecting the defendant's interests.

This Court has recognized that overt police-initiated interrogation of a defendant who has previously requested or obtained counsel poses a threat to the Sixth Amendment right to counsel no less serious than that posed by covert interrogation. Thus, the Court has made clear in *Harvey, Patterson*, and *Jackson* that a waiver by such a defendant of the right to counsel in response to police-initiated interrogation without counsel present after adversarial proceedings have begun is invalid.

By holding that a category of represented defendants can validly waive their Sixth Amendment right to counsel in response to police-initiated interrogation without counsel present, the Louisiana Supreme Court contravened this Court's long line of cases prohibiting the deliberate elicitation of incriminating statements from a represented defendant without counsel present. The Louisiana Supreme Court's decision permits the police to circumvent counsel's vital role in protecting the defendant against the State during a critical stage of the prosecution.

The facts of this case pointedly illustrate how the decision below will encourage police officers to interfere in blatant fashion with counsel's role "as a 'medium' between [the defendant] and the State." *Moulton*, 474 U.S. at 176. The officers here approached Petitioner hoping to obtain incriminating admissions in the absence of counsel and succeeded in doing so by telling Petitioner falsely that he was wrong in asserting that counsel had been appointed

for him. Pet. App. 49a & n.69; *see* note 7, *supra*.[10] Through that deception, the officers removed counsel as a medium between Petitioner and the State. The Sixth Amendment does not tolerate such conduct nor a rule that encourages it.

---

[10] If this Court were to agree with the Louisiana Supreme Court that a represented defendant must affirm the appointment of counsel by a statement or gesture to trigger *Jackson*, Petitioner's repeated assertion that "I got a lawyer appointed to me" (Pet. App. 49a) undoubtedly should have sufficed.

CONCLUSION

The judgment of the Louisiana Supreme Court should be reversed.

Respectfully submitted,

BARBARA BERGMAN
Co-chair, Amicus Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1117 Stanford, N.E.
Albuquerque, N.M. 87131
(505) 277-3304

JONATHAN L. MARCUS
Counsel of Record
ANNA E. LUMELSKY
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

STEVEN SHAPIRO
ROBIN DAHLBERG
AMERICAN CIVIL LIBERTIES UNION NATIONAL LEGAL OFFICE
125 Broad Street
18th Floor
New York, NY 10004
(212) 549-2500

DAVID S. UDELL
MELANCA CLARK
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
(212) 998-6730

KATIE SCHWARTZMANN
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF LOUISIANA
PO Box 56157
New Orleans, LA 70156
(504) 592-8056

NOVEMBER 2008

Counsel for Amici Curiae